85-511

No. .....

Supreme Court, U.S.
FILED
SEP 23 1985
JOSEPH F. SPANIOL, JR.
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In The

Supreme Court of the United States

October Term, 1985

PAK-MOR MANUFACTURING COMPANY,

Petitioner,

vs.

JERRY JONES and SANDRA JONES,
husband and wife,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT IN AND FOR THE STATE OF ARIZONA

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61 pp

QUESTION PRESENTED FOR REVIEW

Whether the Arizona Supreme Court denied Petitioner Pak-Mor Manufacturing Company due process and equal protection under the constitution of the United States by refusing to remand the matter for an evidentiary hearing following its opinion holding that evidence of the absence of other accidents was admissible under certain circumstances upon the laying of a proper foundation.

TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Constitutional Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	8
Conclusion	13
Appendix	App. 1

TABLE OF AUTHORITIES

CASES:

Chicago, Milwaukee and St. Paul Railway Company v. Thompkins, 176 U.S. 167, 20 S.Ct. 336, 44 L.Ed. 417 (1900) 11

Combs v. United States, 408 U.S. 224, 92 S.Ct. 2284, 33 L.Ed. 2d 308 (1972) 11, 12

Erie Railroad Company v. Thompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 2d 1188 (1938) 10

Estho v. Lear, 32 U.S. 130, 7 Pet. 130, 8 L.Ed. 632 (1833) 11

Ford Motor Company v. National Labor Relations Board, 305 U.S. 364, 59 S.Ct. 301, 83 L.Ed. 2d 221 (1939) 11

Fox Tucson Theatres Corporation v. Lindsay, 47 Ariz. 388, 56 P.2d 183 (1936) 8

Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963) 10

Hlavaty v. Song, 102 Ariz. 606, 491 P.2d 460 (1961) 9

Idaho Sheet Metal Works Inc. v. Wirtz, 383 U.S. 19, 86 S.Ct. 737, 15 L.Ed. 2d 694 (1966) 11

TABLE OF AUTHORITIES—Continued

	Page
Jones v. Pak-Mor Manufacturing Company, — Ariz. —, 700 P.2d 830 (App. 1984)	9
Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed. 2d 697 (1960)	12
Levy v. Arredondo, 37 U.S. 218, 12 Pet. 218, 9 L.Ed. 1062 (1838)	11
Louis K. Liggett Company v. Lee, 288 U.S. 517, 53 S.Ct. 481, 77 L.Ed. 929 (1933)	12
Lincoln Gas and Electric Light Company v. Lincoln, 223 U.S. 349, 32 S.Ct. 271, 56 L.Ed. 466 (1912)	11
Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081 (1961)	10
New York Times Company v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L. Ed. 2d 686 (1964)	10
Padilla v. Southern Pacific Transportation Company, 131 Ariz. 533, 642 P.2d 878 (App. 1982)	9
Quaker City Cab Company v. Commonwealth of Pennsylvania, 277 U.S. 389, 48 S.Ct. 553, 72 L. Ed. 927 (1928)	13
Rosenblatt v. Baer, 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed. 2d 597 (1966)	11
St. Gregory's Church v. O'Connor, 13 Ariz. 421, 477 P.2d 540 (1971)	9
United States v. Rio Grande Irrigation Company, 184 U.S. 416, 22 S.Ct. 428, 46 L.Ed. 619 (1902)	11
United States v. Salvucci, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed. 2d 619 (1980)	12

TABLE OF AUTHORITIES—Continued

Page

Villa v. Van Schalek, 299 U.S. 152, 57 S.Ct. 128, 81 L.Ed. 91 (1936) 11

Walton v. State of Arkansas, 371 U.S. 28, 83 S.Ct. 9, 9 L.Ed. 2d 9 (1962) 11

Watts v. Seward School Board, 381 U.S. 126, 85 S.Ct. 1321, 14 L.Ed. 2d 261 (1965) 11

Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914) 10

Whitely v. Warden, Wyoming State Penitentiary, 41 U.S. 560, 91 S.Ct. 1031, 28 L.Ed. 2d 306 (1971) 11

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT IN AND FOR THE STATE OF ARIZONA

Petitioner Pak-Mor Manufacturing Company respectfully prays that a writ of certiorari issue to review the opinion of the Supreme Court in and for the State of Arizona entered in this proceeding on June 25, 1985.

OPINIONS BELOW

The opinion of the Arizona Supreme Court is reported at — Ariz. —, 700 P.2d 819 (1985) and is reproduced in Appendix App. 1-App. 22. The opinion of the Arizona Court of Appeals is reported at — Ariz. —, 700 P.2d 830 (1984) and is reproduced in Appendix App. 22-App. 42.

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JURISDICTION

The opinion of the Arizona Supreme Court was entered on January 17, 1985. A timely petition for reconsideration was filed by Pak-Mor Manufacturing Company and was denied on June 25, 1985. This petition is filed within ninety (90) days of that date. The court's jurisdiction is invoked under 28 U.S.C. § 1257 (3).

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CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment to the Constitution of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

———o———

STATEMENT OF THE CASE

Petitioner is a small manufacturing company in San Antonio, Texas, building trash collection units. The units are mounted on a motor vehicle chassis purchased from other sources. The assembled vehicle is then sold to municipalities and "private haulers" throughout the United States. For thirty-nine years petitioner has used essentially the same design for the trash collection units. In 1979 an accident occurred involving respondent Jerry Jones as he was working as a trash collector on a Pak-Mor equipped vehicle sold to SCA Services of Arizona, respondent's employer.

The Product

The product which is the subject of this litigation is a side loading refuse compaction machine designated by the manufacturer as a Pak-Mor model 20H. Pak-Mor manufactures the compaction machine and the fender running board and these items are mounted, usually at the Pak-Mor Manufacturing facility, on a truck, cab and chassis supplied by any of a number of manufacturers as specified by the purchaser.

The machine was initially designed and produced beginning in 1947 with a chain driven mechanical device for compacting the collected refuse and was designated as the model AF. Additional development occurred in 1959 and '60 during which time the units were converted to a hydraulic compaction mechanism designated as the H-model. Production of the H-model began in 1961.

The fender running board had been a part of the design since 1947, and was designed to provide a space on which the rider or loader could ride from stop to stop.

The running board was to provide a continuous surface from the back of the cab to the rear fender and to provide protection to anyone riding on the running board in the event he slipped while either getting on or getting off the vehicle.

As the vehicle would approach a location where refuse was to be collected, the driver would stop, the worker would step off the running board, pick up the can or container of refuse to be collected, dump it into the side of the machine, replace it on the ground or street, remount the running board, and at that point ride to the next pick up point.

The manufacturer also provided folding "extension steps" which extended outward from each fender running board; however, the extension steps had been removed from the unit in question.

The machines are marketed through a nationwide distribution system comprised of some sixty distributors and is additionally sold to some twenty countries outside the United States. A large number of the units had been produced with the company estimating that it produced approximately five hundred units in the year 1973 and approximately 1025 in the year 1981.

The Accident

Respondent was hired when SCA was faced with a labor strike. Although he had never worked as a refuse collector, respondent received minimal instruction on rear-loading machines, and received no instruction on the side-loading machine. During the first two days of employment, respondent worked as a helper on a rear-loading machine. On his third day at work, respondent was as-

signed to work on a side-loading machine. Mike Campbell, who was hired at the same time as respondent, was to operate the vehicle while Mr. Jones deposited the trash into the vehicle. His custom was to ride on the fender running board between pick-up points on the route with his body position toward the machine and his head turned to the left looking toward the front of the machine while holding on to a grab iron or rail affixed to the side of the machine.

Jones testified that he would occasionally come in contact with brush and tree limbs growing in the alleys as the refuse compaction machine was traveling from pick-up point to pick-up point. He testified that at approximately 8:00 a.m. the truck entered an alley, stopped to pick up several cans of garbage, and then continued on along a fence line. Jones indicated that he was riding on the fender running board of the machine as it continued down the alley and was not looking forward until just before the alley curved around the fence corner. When he looked up he momentarily saw that the vehicle was approaching a fence. The driver turned the corner too sharply, and Jones testified that this caused him to hit his right cheek and shoulder on the fence corner, and this in turn caused his body to turn approximately 180 degrees. At the same time his left leg was caught between the edge of the fender running board and the corner of the fence, causing a break of the bones in his leg.

The driver stopped and with the assistance of a helper placed Jones in the cab of the truck. Jones was initially taken back to the offices of SCA and was then transported by ambulance to the emergency room at St. Mary's Hospital.

The Lawsuit

As a result of the above accident respondent filed suit against, among others, Pak-Mor Manufacturing Company alleging that it had negligently developed, designed, manufactured, assembled, distributed, failed to warn and sold the garbage collection machine on which respondent was working at the time of his injury, and that such negligence was willful, wanton and in reckless disregard of the life and safety of Mr. Jones. The complaint further alleged that the refuse collection machine was defective and unreasonably dangerous.

Prior to trial, respondent moved in limine that any and all evidence of the absence of similar accidents in the thirty two years the design had been used be excluded. Pak-Mor filed its opposition and at oral argument made an offer of proof that the president of Pak-Mor Manufacturing Company would testify that the unit on which respondent was riding was first designed in 1947, that it had not been substantially modified up until the present and that during that period Pak-Mor Manufacturing Company had received no reports of injuries occuring in a fashion similar to respondents.

The trial court granted respondents' motion, ruling that no evidence of the absence of similar prior accidents could be presented. At trial the jury returned a verdict in favor of respondents and against Pak-Mor Manufacturing Company in an amount of $1,300,000.00.

On appeal to the Arizona Court of Appeals the trial Court's decision was affirmed:

> "At the outset of the trial, the court granted the appellees' [respondents] motion in limine to exclude

evidence that there had been no similar accidents involving machines of the same design. Appellants [Pak-Mor Manufacturing Company] offered to prove that the product was designed and put into production in 1947, and that the design had continued without change in the area claimed to have been defectively designed through the date of the manufacturer of this subject machine in 1973. Appellants further offered to prove at trial that during approximately 26 years of use, no injuries were reported or claims made against them for any injuries sustained by a side worker as a result of the collection unit passing near or being driven into a stationary object, such as occurred in this case.

Appellant argues that such evidence is relative to both the negligence and strict liability claims in that it provides "some evidence" that the product was not defective or unreasonably dangerous and that it was not negligent in adopting the design. However, the trial court properly excluded such evidence. Although there is extensive contrary authority in other jurisdictions both in the negligence and strict liability context, the law in Arizona is clear that such evidence is inadmissible and we are not permitted to hold otherwise." 700 P.2d at 834.

The Arizona Supreme Court accepted review and on January 17, 1985 issued its opinion. In that opinion the Supreme Court of Arizona overruled prior Arizona decisions dating back to 1936. Further, it set forth specific criteria and guidelines for admission of such evidence in the future. Nonetheless, the court refused to remand the case for an evidentiary hearing to determine whether the petitioner could introduce evidence that would meet the criteria it had established. Rather, the Supreme Court held that the offer of proof as made prior to trial, and

some months before the rule was formulated was insufficient.

In Pak-Mor's supplemented motion for reconsideration to the Arizona Supreme Court it argued that such a refusal to remand denied Pak-Mor the Due Process and Equal Protection guaranteed by the Fourteenth Amendment to the United States Constitution insofar as it allowed every defendant *except* Pak-Mor the benefit of the Pak-Mor holding.

The petition was denied on June 25, 1985. This petition follows.

REASONS FOR GRANTING THE WRIT

The law is not, and has never been a static, fixed monolith. Rather it is a reflection of what society is and what it should be. While there is disagreement as to whether the law should reflect social change or spur it, there is total agreement that when a rule has outlived its usefulness it must be cast aside. The law encourages such examination and change by rewarding the party that endeavors to correct an injustice.

This is exactly what Pak-Mor Manufacturing Company has done. In 1936 the Arizona Supreme Court was first faced with the question of whether the lack of prior accidents should be admissible to establish negligence. The Supreme Court in *Fox Tucson Theatres Corporation v. Linsay,* 47 Ariz. 388, 56 P.2d 183 (1936) held:

> "We think the majority and the better rule is that it [the introduction of evidence of lack of prior accidents] should not be permitted." 56 P.2d at 185.

The rule was reiterated time and again by both the Arizona Court of Appeals and the Arizona Supreme Court.[1]

There can be no doubt that the "Pak-Mor rule" is the abrogation of a fifty year old rule which had long outlived its usefulness. Yet, the antiquated rule would survive today had Pak-Mor not challenged the fundamental underpinnings of the rule. It was Pak-Mor that painstakingly made its record for appeal. It was Pak-Mor who meticulously prepared its opening and answering briefs in the Arizona Court of Appeals. It was Pak-Mor that advanced the position that the rule was artificial, was contrived, and no longer served the ends of fairness. It was Pak-Mor that petitioned the Arizona Supreme Court and prepared yet another comprehensive, detailed and complete anthology of the history of the rule. It was Pak-Mor that finally prevailed and changed the law in Arizona. It is everyone else who benefits.

What possible encouragement can such a holding be to the future of the law? What responsible attorney would suggest, and what right thinking client would pay to right a wrong when it would have no effect on the litigants involved?

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1. *Hlavaty v. Song*, 102 Ariz. 606, 491 P.2d 460 (1961); *Padilla v. Southern Pacific Transportation Company*, 131 Ariz. 533, 642 P.2d 878 (App. 1982); *St. Gregory's Church v. O'Connor*, 13 Ariz. 421, 477 P.2d 540 (1971); *Jones v. Pak-Mor Manufacturing Company*, — Ariz. —, 700 P.2d 830 (App. 1984).

This court has recognized that those who labor to change the law are entitled to the fruits of their work. In *Erie Railroad Company v. Thompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed 2d 1188 (1938), the Erie Railroad Company changed forever the law applied by Federal Courts in diversity actions. In light of the new rule *their* case was remanded.

In *Weeks v. United States,* 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), Weeks established the exclusionary rule for evidence collected by federal officials. In light of the new rule *his* case was remanded.

In *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081 (1961), Miss Mapp argued that the rule as adopted in *Weeks* (supra) should apply to state officers as well. This court agreed, and in light of the new rule *her* case was remanded.

In 1963 this court accepted the argument of Clarence Earl Gideon in *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963) and changed the rights of all accused. As a result of the new rule, *his* case was remanded.

In *New York Times Company v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964) the New York Times argued that the First Amendment afforded certain protections to media defendants when they wrote of public figures. This court agreed, and in light of the new rule remanded the case.

The list above is by no means exhaustive, but an indication that this court has recognized in the past that

where one works to change the law one is entitled to the benefit of that work.

On a number of occasions this court has directly addressed the propriety of remanding a case for further proceedings.[2]

In *Ford Motor Company v. National Labor Relations Board*, 305 U.S. 364, 59 S. Ct. 301, 83 L.Ed. 2d 221 (1939), the Supreme Court granted review of a National Labor Relations Board dispute in which the Federal Court of Appeals ordered the matter remanded to the labor board for a further evidentiary hearing. The Supreme Court affirmed the remand and held:

> "It is familiar appellate practice to remand cases for further proceedings without deciding the merits, where justice demands that course in order that some defect in the record may be supplied. Such a remand may be made to permit further evidence to be taken or additional findings to be made upon essential points." 59 S.Ct. at 306-307.

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2. *Estho v. Lear*, 32 U.S. 130, 7 Pet. 130, 8 L.Ed. 632 (1833); *Levy v. Arredondo*, 37 U.S. 218, 12 Pet. 218, 9 L.Ed. 1062 (1838); *Villa v. Van Schalek*, 299 U.S. 152, 57 S.Ct. 128, 81 L.Ed. 91 (1936); *Chicago, Milwaukee and St. Paul Railway Company v. Thompkins*, 176 U.S. 167, 20 S.Ct. 336, 44 L. Ed. 417 (1900); *United States v. Rio Grande Irrigation Company*, 184 U.S. 416, 22 S.Ct. 428, 46 L.Ed. 619 (1902); *Lincoln Gas and Electric Light Company v. Lincoln*, 223 U.S. 349, 32 S.Ct. 271, 56 L.Ed. 466 (1912); *Walton v. State of Arkansas*, 371 U.S. 28, 83 S.Ct. 9, 9 L.Ed. 2d 9 (1962); *Watts v. Seward School Board*, 381 U.S. 126, 85 S.Ct. 1321, 14 L.Ed. 2d 261 (1965); *Rosenblatt v. Baer*, 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed. 2d 597 (1966); *Idaho Sheet Metal Works Inc. v. Wirtz*, 383 U.S. 19, 86 S.Ct. 737, 15 L.Ed. 2d 694 (1966); *Whiteley v. Warden, Wyoming State Penitentiary*, 41 U.S. 560, 91 S.Ct. 1031, 28 L.Ed. 2d 306 (1971); and *Combs v. United States*, 408 U.S. 224, 92 S.Ct. 2284, 33 L.Ed. 2d 308 (1972).

The issue was again addressed in *United States v. Salvucci,* 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed. 2d 619 (1980). In *Salvucci, supra,* the defendants were arrested and charged with possession of stolen mail following an allegedly unconstitutional search of the defendant's mother's house. At a suppression hearing the District Court agreed that the search was unconstitutional, and ordered the documents suppressed. The holding was affirmed by the Court of Appeals. Petition to this court was sought, accepted, and on June 25, 1985 the United States Supreme Court reversed the lower courts and overruled a portion of its earlier holding in *Jones v. United States,* 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed. 2d 697 (1960).

After setting forth the new procedural law the court dealt with the case at bar and held:

> "This action comes to us as a challenge to a pretrial decision suppressing evidence.
>
> The respondents relied on automatic standing and did not attempt to establish that they had a legitimate expectation of privacy in the area of Zackular's mother's home where the goods were seized. We therefore think it appropriate to remand so that respondents will have an opportunity to demonstrate, if they can, that there own Fourth Amendment rights were violated. See *Combs v. United States,* 408 U.S. 224, 92 S.Ct. 2284, 33 L.Ed. 2d 308 (1972).
>
> Reversed and remanded." 100 S.Ct. at 2555

This Court long ago held that every right and privilege afforded "persons" under the Fourteenth Amendment to the United States Constitution should be afforded corporations as well. *Louis K. Liggett Company v. Lee,*

288 U.S. 517, 53 S.Ct. 481, 77 L.Ed. 929 (1933); *Quaker City Cab Company v. Commonwealth of Pennsylvania*, 277 U.S. 389, 48 S.Ct. 553, 72 L.Ed. 927 (1928).

Pak-Mor Manufacturing Company prays this Court for an opportunity to be treated no better, and no worse than those who ride in her wake. To apply the Pak-Mor rule to each and every defendant but Pak-Mor, as the Arizona Supreme Court has done, denies it what it has so diligently sought: to be treated equally and with due process.

CONCLUSION

For the reasons above stated the Court is respectfully requested to grant the writ of certiorari.

Respectfully submitted,

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IN THE SUPREME COURT FOR THE STATE OF ARIZONA

JERRY JONES and SANDRA JONES, husband and wife,

Plaintiffs/Appellees,

v.

PAK-MOR MANUFACTURING COMPANY,

Defendant/Appellant.

Supreme Court of Arizona,

En. Banc.

FELDMAN, Justice:

Jerry Jones (plaintiff) was injured on January 27, 1979, while working on a machine manufactured by Pak-Mor Manufacturing Company (defendant). In the product liability action which followed, plaintiff alleged improper design and sought recovery on theories of neglicence and strict liability. Before trial, plaintiff moved to exclude all evidence of the absence of prior, similar accidents. The trial court granted plaintiff's motion, ruling that such evidence was inadmissible under Arizona law. After verdict and judgment for plaintiff, defendant appealed, claiming, *inter alia*, that the exclusion ruling was in error. The court of appeals affirmed. *Jones v. Pak-Mor Manufacturing Co.*, — Ariz. —, 700 P.2d 830 (1984). Defendant petioned this court for review. We have jurisdiction. Ariz. Const. art. 6§5(3); Rule 23 Ariz. R. Civ. App. P., 17A A.R.S. We accepted review only on the issue pertaining to admissibility of evidence of the absence of prior accidents.

FACTS

The facts of this case are set forth fully in the opinion of the court of appeals. We state here only those facts necessary for the determination of the issue upon which we granted review. Plaintiff was employed by SCA Services of Arizona, Inc. On January 27, 1979, plaintiff was injured while working on a side-loading refuse compaction and collection machine on a route served by SCA. He had been hired only three days before and had received limited instructions for working on the rear-loading machine to which he was assigned for his first two days on the job. He received no instructions for working on the side-loading machine to which he was assigned on his third day of work. The driver of his vehicle also was newly hired.

The men began work at 6 a.m. The driver was given a map of the collection route, and he and plaintiff drove to an area outside Tucson where they began collecting garbage. Plaintiff was working as a helper on the driver's side of the machine, standing on the fender running board as the truck proceeded between pick-up points. Plaintiff rode with his body facing the machine. As plaintiff stood on the running board, his head was generally turned to the left, and he was looking toward the front of the machine while he held onto the grab iron attached to the side of the machine. Each side of the machine contained two doors which were open to receive the garbage collected at various points and emptied into the compactor.

Early in the morning, the truck entered an alley, stopped so that the helper could pick up several cans of garbage, and then continued down the alley along a fence

line. The alley was less than ten feet wide, while the truck was about eight feet wide. Plaintiff, riding on the running board, was not looking forward until just before the alley curved, when he looked up and saw the fence "coming toward" him. The driver turned the curve sharply, and plaintiff was caught between the fence and the vehicle. Plaintiff's left leg was seriously injured.

Plaintiff filed an action against his employer, a coworker, the manufacturer of the truck to which the compactor was attached, and Pak-Mor, the company which built the compactor. Before trial, all claims against defendants other than Pak-Mor were settled or dismissed Trial proceeded against Pak-Mor on counts of negligence and strict liability.

The evidence at trial indicated that the Pak-Mor garbage compacting machine comes in several series, differing mainly in the capacity of the compactor. The compactors are designed so that the workmen may jump off the truck, grab garbage cans, empty them into the compactor, and ride on the compactor itself as the truck pulls the machine between collection points. As they ride, the workmen stand on a running board on the side of the truck-compactor. The standing space for the worker is reduced by the cylindrical shape of the compactor, so that only three and one-half to four inches of space is available within the actual width of the compactor. A.R.S. §28-1002(A) limits the outside width of any vehicle, including its load, to eight feet; therefore, the design of the running board and compaction machine forced plaintiff's body to "extend beyond the protected, lawful width of the vehicle." (Jones v. Pak-Mor, — Ariz at —, 700 P.2d 821.)

The Pak-More compactor was originally designed in 1947. The machine on which plaintiff was riding at the time of the accident was a 1972 model. The parties disagree with respect to whether the redesign in 1972 changed the design in any way relevant to the case at bench. Because we consider the propriety of the exclusion of evidence offered by defendant, we view the record on this question in the light most favorable to admission of that evidence. Taken in that light, the evidence indicates that no material change in the design occurred and that the compactor on which plaintiff was riding was a model which had been used without relevant change for a period of twenty-six years.

At the beginning of trial, plaintiff moved to exclude any evidence that the machine had been in use for twenty-six years without report of similar accidents. In opposing the motion, defendant offered to prove that the product had been designed and put into use in 1947, that the relevant portion of the design had not been changed, that thousands of machines with the same design had been sold, that they had been used under widely varying conditions, and that there had been no report of claims to or against defendant based on any injury sustained in a manner similar to that alleged by plaintiff. Defendant was prepared to offer this evidence through the testimony of its president. It argued that the evidence was relevant to show that the design was not defective, that the product was not unreasonably dangerous, and that the defendant had no notice of any defect or danger.

While recognizing that there is authority from other jurisdictions supporting the admission of evidence relating to the absence of prior accidents in both negligence

and strict liability actions, both the trial judge and the court of appeals correctly noted the existence of Arizona decisions "admit[ting] evidence of prior accidents, but exclud[ing] evidence of the absence of prior accidents." (Jones v. Pak-Mor, at —, 700 P.2d at 821.) As the court of appeals further noted, in Arizona the rule is "applied mechanically." (*Id.*) Although the trial court has discretion to admit evidence of prior accidents, the rule relating to inadmissibility of evidence of the absence of prior accidents is a *per se* rule. *Hlavaty v. Song,* 107 Ariz. 606, 491 P.2d 460 (1971). Evidence of the absence of prior accidents under similar conditions is inadmissible to prove lack of defect, lack of danger, or similar issues. *Id. But see Rayner v. Stauffer Chemical Co.,* 120 Ariz. 328, 585 P.2d 1240 (App. 1978) (holding such evidence admissible to show characteristics of the product with respect to its capacity to cause certain types of injury).

The rule of *per se* inadmissibility was first adopted by this court in *Fox Tucson Theaters Corp. v. Lindsay,* 47 Ariz. 388, 56 P.2d 183 (1936). Defendant argues that *Lindsay* was not meant as a *per se* rule, that it is now a minority rule, that it is unsupported by logic, and that this court should reconsider it. Finding these arguments persuasive, we accepted review. Rule 23, Ariz.R.Civ.App. P., 17A A.R.S.

RELEVANCE

1. The Basis for Rejection

The reason given in *Lindsay* for the rule of inadmissibility was that

> . . . it is apparent that such testimony, could the parties be prepared to meet it, might introduce into

> the case numerous collateral issues bearing only remotely on the main issue, which would tend to greatly protract the trial, distract the attention of the jury from the issues involved in the suit, and impose great and unnecessary expense on the parties.

Fox Tucson Theaters Corp. v. Lindsay, 47 Ariz. at 395, 56 P.2d at 186, quoting from the seminal case of *Anderson v. Taft,* 20 R.I. 362, 39 A. 191, 192 (1898). A second reason sometimes given for the *per se* rule of inadmissibility in some of the earlier literature was that

> Litigants should be protected against surprise. . . . [S]afety-history evidence is not closely confined in time, and sometimes not in space. Therefore, opposing counsel may be unprepared to meet fraudulent, partial, or mistaken testimony about accidents other than the principal one, or about long periods of safe use.

Morris, *Proof of Safety History in Negligence Cases,* 61 Harv.L.Rev. 205, 210 (1948). A final consideration was that jurors would be misled or prejudiced by such evidence. Thus, jurors impressed by the defendant's good record might be swayed in his favor and fail to see that he had lowered his standards. *Id.* at 210-11.

While some of these objections may still be viable, recent cases indicate that the rule of *per se* inadmissibility is "manifestly incompatible with modern principles of evidence." *Simon v. Town of Kennebunkport,* 417 A.2d 982, 985 (Me.1980). In *Simon* the court rejected a *per se* rule of inadmissibility of evidence of other accidents and stated:

> Whatever the continued vitality . . . of an absolute prohibition against other-accident evidence, it is clear that such a rule did not survive the adoption of our new Rules of Evidence. . . .

Id. at 986; *see also Sturm v. Clark Equipment Co.*, 547 F.Supp. 144, 145 (W.D.Mo. 1982), *aff'd*, 732 F.2d 161 (8th Cir. 1984) (noting that under the Federal Rules of Evidence the absence of prior accidents is "relevant and admissible, assuming an adequate foundation is established regarding comparability of circumstances").

We note also that the rule of *per se* inadmissibility, adopted in *Fox Tucson Theaters Corp. v. Lindsay* and followed in other cases, has been criticized by most, if not all, evidence scholars. *See McCormick on Evidence* § 200 at 590-92 (E. Cleary ed. 1984); M. Udall & J. Livermore, *Arizona Law of Evidence* § 85 at 190 (2d 1982); 2 Wigmore, *Evidence* § 443-44 at 528-32 (Chadbourn rev. 1979). Observing that few recent decisions have applied a general rule of exclusion, McCormick has criticized the lack of symmetry in the rule allowing a judge discretion to admit proof of other accidents but not proof of the absence of other accidents:

> One might think that if proof of similar accidents is admissible in the judge's discretion to show that a particular condition or defect exists, or that the injury sued for was caused in a certain way, or that a situation is dangerous, or that defendant knew or should have known of the danger, then evidence of the absence of accidents during a period of similar exposure and experience likewise would be receivable to show that these facts do not exist in the case at bar. Indeed, it would seem perverse to tell a jury that one or two persons besides the plaintiff tripped on defendant's stairwell while withholding from them the further information that another thousand persons descended the same stairs without incident.

McCormick, *supra*, § 200 at 590. Similarly, Wigmore has rejected as unsound a fixed rule of admissibility or inad-

missibility, favoring instead a general rule of judicial discretion:

> It is much wiser and more practical to leave the possible inconvenience to be determined by the tribunal best fitted to determine it, the trial court, and to sanction the reception of all such relevant evidence subject to this exclusionary discretion based on inconvenience.

2 Wigmore, *supra,* § 444 at 532.

Whatever the debate waged in the courts and by the authors of articles and treatises, we believe that our position should be compatible with the rules of evidence which we adopted in 1977. A blanket rule of inadmissibility is essentially a rule of relevancy. As a matter of law it declares the evidence inadmissible either because it lacks probative value with regard to the issues presented or because its probative value is outweighed by the danger of prejudice and the problems associated with inquiry into collateral matters, such as time wasted, expense, and the like. *See Simon v. Town of Kennebunkport,* 417 A.2d at 986.

2. *The Rules of Evidence*

We turn, then, to an examination of the rules of evidence. Rule 401[1] defines "relevant evidence" as that "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The essence of a negligence action based on defective design is that defendant distributed a product

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1. Specific references to the Arizona Rules of Evidence will be noted throughout this opinion as "Rule —."

when it was reasonably foreseeable that its design presented an unreasonable risk of harm. W. Prosser & W. Keeton, *The Law of Torts* §§ 96, 99 at 688-89, 698-702 (5th ed. 1984). In a strict liability action, the plaintiff must prove that the product was defective and unreasonably dangerous. Restatement (Second) of Torts § 402A. The factors which bear upon this determination in a defective design case were considered by us in *Byrns v. Riddell, Inc.*, 113 Ariz. 264, 550 P.2d 1065 (1976). One of those factors is the likelihood that the product, as designed, will cause serious injury. *Id.* at 267, 550 P.2d at 1068. Thus, in product liability actions based on defective designs, relevant issues may include whether defendant should have foreseen the potential for danger from use of the product as designed, whether a defect existed, and whether a particular danger was unreasonable—including the likelihood of its causing serious injury. Safety-history, including the presence or absence of prior accidents under similar use, is evidence which may make these ultimate facts "more probable or less probable than [they] would be without the evidence." Rule 401, Ariz.R.Evid., 17A A.R.S. *See, e.g., Schwartz v. American Honda Motor Co.*, 710 F.2d 378, 382 (7th Cir. 1983); *Darrough v. White Motor Co.*, 74 Ill.App.3d 560, 565, 30 Ill.Dec. 467, 393 N.E.2d 122, 125-26 (1979); *Reiger v. Toby Enterprises*, 45 Or.App. 679, 682-83, 609 P.2d 402, 404 (1980); *McCormick, supra*, § 200. There can be no doubt that evidence of safety-history is relevant.

Once evidence is shown to be relevant, Rule 402 provides that it is admissible unless "otherwise provided" by constitutional provision, statute, or rule. Several rules of evidence provide for *per se* inadmissibility, subject to

enumerated exceptions. *See* Rules 404 and 407-411.[2] No specific rule of evidence mandates rejection of evidence of safety-history. The one rule that applies to safety-history evidence is Rule 403, which covers the concerns expressed by this court in *Fox Tucson Theaters Corp. v. Lindsay, supra,* and described by Wigmore as "considerations of auxiliary probative policy." 2 Wigmore, *supra,* § 443 at 528. Rule 403 permits exclusion of evidence when

> [a]lthough relevant, . . . its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 403 is not a rule of *per se* inadmissibility, but one which gives the court discretion to reject relevant evidence upon the grounds stated. 1 *Weinstein's Evidence* § 403 [01] (1982). It is essentially a rule which requires the court to weigh and balance the benefit to be gained by admission against the harm which may result from admission. It is the rule applicable to evidence showing the existence of prior accidents. *Simon v. Town of Kennebunkport,* 417 A.2d at 986. It is the rule which defendant claims logically should apply to evidence of the absence of prior accidents in cases involving alleged negligent or defective design. For this proposition defendant cites a number of recent cases holding that the trial court has discretion under Rule 403 to admit evidence of the absence of prior accidents. *Schwartz v. American Honda Motor Co., Inc.,*

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2. These rules declare inadmissible evidence of character, subsequent remedial measures, compromise and offers of compromise, payment of medical and similar expenses, offers to plead and withdrawn pleas, and existence of liability insurance.

supra; Sturm v. Clark Equipment Co., supra; Darrough v. White Motor Co., supra; Caldwell v. Yamaha Motor Co., supra.

3. *Characterization of Evidence of the Absence of Prior Accidents*

There is little logic in the proposition that the trial court may admit evidence of other accidents but may never admit evidence of their absence. *See* McCormick, *supra,* §200 at 590. Nevertheless, experience teaches us that the problems of prejudice, inability of the opposing party to meet the evidence, and the danger of misleading the jury are substantial. We are aware, also, that defendant's "lack of notice" of injury does not establish the fact that no injuries had occurred, and that a "long history of good fortune" may not preclude the conclusion that the product was defective and unreasonably dangerous. *Tucson Industries, Inc. v. Schwartz,* 108 Ariz. 464, 468, 501 P.2d 936, 940 (1972).

We believe that the true problem underlying the rejection of evidence of the lack of prior accidents is more evidentiary than substantive in nature. The essential nature of evidence of the absence of prior accidents is different from evidence of the existence of prior accidents. It is harder to prove that something did not happen than to prove that it did happen. When a witness testifies that he knows of no prior accidents, there are two possible explanations. The first is that there have been no prior accidents; the second is that there have been prior accidents but the witness does not know about them. This problem, however, is not peculiar to safety-history evidence in product liability cases. It is, we believe, a variant of the

"negative evidence" problem. *See* M. Udall & J. Livermore, *supra* §65 at 120; 2 Wigmore *supra,* §664. The response of most courts to this problem has been that testimony that a witness did not see an event (knows of no prior accident) "has, in and of itself no probative force sufficient to prove that the event did not occur." *Byars v. Arizona Public Service Co.,* 24 Ariz. App. 420, 424, 539 P.2d 534, 538 (1975). *See also State v. Jeffers,* 135 Ariz. 404, 661 P.2d 1105 (1983). Generally, courts hold that such negative evidence is inadmissible, unless testimony that the witness did not see the event or does not know of it is coupled with further evidence that the witness was in such a position or has such sources of knowledge that if the event had occurred, he would have seen it or would have known about it. M. Udall & J. Livermore, *supra,* § 65 at 120; 2 Wigmore, *supra,* §664 at 907.

All of these factors indicate the path that should be taken. If the *per se* rule is rejected, the trial court will apply Rule 403, weigh the auxiliary probative problems, and balance them against the value of the evidence. The trial judge should be aware of the difficulty of meeting an allegation that there have been no prior accidents. If a product is very widely distributed, it will be almost impossible for the plaintiff to rebut such a contention when the real issue is simply whether, among millions of users, a few each year may have used the product in a way which produced serious injuries. The trial judge must remember that where plaintiff alleges that a particular use of the product has produced a prior injury, he is put to his proof of the specific instance. The existence of a specific prior occurrence, the question of similarity, and other questions of specific proof are all much easier to meet than the

general assertion that there have been no prior accidents These factors, then, should weigh in the trial judge's determination of admissibility under Rule 403.

Other matters also should be considered. One of these is the plain nature of the danger. An open hole in a sidewalk poses a patent, unreasonable danger to pedestrians. Evidence of the lack of prior accidents is no more than evidence that the plaintiff was the first to fall in the hole. It creates a considerable risk of misleading the jury with respect to the purpose for which the evidence is admitted. Further considerations are similarity of use and length of exposure to the particular danger. *See Darrough v. White Motor Co.,* 74 Ill.App.3d at 565, 30 Ill.Dec. at 472, 393 N.E. 2d at 125. The foundation should include evidence that the product experience which the proponent seeks to prove "is so extensive as to be sure to include an adequate number of similar situations." McCormick, *supra,* § 200 at 591.

We come, then, to the important consideration of the characterization of the evidence. The character of the evidence which might be admissible is determined by the issue on which it is offered. The ultimate issue is not whether lawsuits have been filed, nor whether claims have been made, nor whether the witness is aware of any accidents. The relevance of safety-history evidence is to establish evidentiary facts from which it may be inferred that there have been no prior accidents, thus warranting the ultimate inference that the product was neither defective and unreasonably dangerous nor the cause of the injury. Thus, the proponent of the evidence must establish that if there had been prior accidents, the witness probably would have known about them. This portion of the evidentiary

predicate will, in most cases, be formidable. It is not, however, insurmountable. The defendant may have established a department or division to check on the safety of its products and may have a system for ascertaining whether accidents have occurred from the use of its products. The defendant or its insurers may have made a survey of its customers and the users of its product to determine whether particular uses of the product have produced particular types of injuries. Information may have been complied by and obtained from governmental agencies such as the Consumer Product Safety Commission, the FAA, the FDA, or the FTC. Defendant may have established a system with its insurers, distributors, or retailers whereby retail customers are encouraged to report accidents, accidents are investigated, and data is compiled. Any of these methods, or others, may produce facts with which the proponent of the evidence may establish that if there had been accidents or near-accidents when the product was used in a relevant manner, defendant probably would have learned of the information and would have it available. Thus, if the import of the evidence is no more than testimony that no lawsuits have been filed, no claims have been made, or "we have never heard of any accidents," the trial judge generally should refuse the offered evidence since it has very little probative value and carries much danger of prejudice.[3]

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3. Such evidence has more direct relevance in negligence cases involving defective design than in strict liability cases. The ultimate issue of negligence in design cases revolves around the foreseeability that there was an unreasonable risk of harm in distributing the product as designed. See ante at 823. Defendant's knowledge of prior accidents has more direct and obvious probative value on this question because it is

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We are cognizant, also, that in the ordinary case (*see Fox Tucson Theaters Corp. v. Lindsay, supra*) involving the design or construction of buildings or intersections, the evidentiary predicate which we have described will militate strongly against admission of the evidence. Where, for instance, plaintiff alleges that premises were negligently designed or maintained, the mere fact that no prior accidents have been reported is incomplete. It does not tell us how many near-accidents, nor how many fortuitous escapes from injury, may have occurred, and it leaves the opponent of the evidence no method to ascertain and identify those who may have passed by the area, under what conditions, and with what risks or experience. In such a case, the scales tip strongly in favor of rejection of the evidence. However, in product design defect cases, the focus is on the inherent nature and quality of all products of similar design. If the design is "defective", then all units have the same defect. *See* R. Hursh & H. Bailey, 1 *American Law of Products Liability* § 1.21 at 66-67 (2d ed. 1974). In such cases, the accumulation of relevant data is possible if the defendant, its insurers, distributors, customers, or some

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easier to foresee the repetition of that which has already occurred. Thus, if plaintiff has attempted to prove that there have been prior accidents and to argue that defendant knew or should have known of those accidents, then the lack of claims and reports may have direct probative value and be independently admissible. Also, evidence of the lack of reports and claims of accidents has more direct admissibility and relevance where defendant attempts to show the design danger was unforeseeable by offering evidence that prior to the accident it had attempted to gather information about the safety-history of its products and had found no report or claim of untoward occurrence. Neither of these circumstances appears to have arisen in the case at bench.

governmental agency has undertaken appropriate steps to acquire and compile information on safety-history. Under such circumstances, we believe that the problem of trial preparation is manageable. Once either party learns, through appropriate discovery, of the other's intent to offer evidence of safety-history, the opponent uusually will be in a position to undertake some type of discovery or investigation to meet the assertion, so long as the offer is specific and not merely "we know of no claims." In these cases, the balancing test required by Rule 403 may well tip toward admission.

One further consideration must be examined. Plaintiff argues that the policy of product liability law should be to foster the manufacture and distribution of safe products and to discourage the distribution of unsafe products. Therefore, plaintiff maintains that we should continue to follow a policy of admission of proof of prior accidents under similar circumstances and *per se* exclusion of relevant evidence of lack of prior accidents, even though this rule has been criticized. We agree with the premise but not with the conclusion. We have recognized safety incentive as a factor in the evolution of Arizona law of product liability. *Salt River Project v. Westinghouse,* 143 Ariz. 368, 694 P.2d 198 (1984). We disagree, however, with the assumption made by the plaintiff. Safety is not promoted by giving manufacturers, sellers, and distributors an incentive to refrain from learning about their products. The present rule, providing for discretionary admission of evidence of prior accidents and automatic exclusion of evidence of the lack of prior accidents, does just that. We believe the law is better served by a rule which gives manufacturers and distributors the utmost incentive to acquire, record,

and maintain information regarding the performance of their products.

We hold, therefore, that in product liability cases involving a claim of defective design, whether based on negligence, strict liability, or both, the trial court has discretion under Rule 403 to admit evidence of safety-history concerning both the existence and the nonexistence of prior accidents, provided that the proponent establishes the necessary predicate for the evidence.[4] The evidence of safety-history is admissible on issues pertaining to whether the design caused the product to be defective, whether the defect was unreasonably dangerous, whether it was a cause of the accident, or—in negligence cases—whether the defendant should have foreseen that the design of the product was not reasonably safe for its contemplated uses.

In the case at bench, the trial court held that evidence of the lack of prior accidents was *per se* inadmissible. The court of appeals affirmed that holding. We turn, then, to determine whether that ruling constituted reversible error.

THE NATURE OF THE EVIDENCE OFFERED

At the hearing on the motion in limine preceding the trial court's ruling that evidence of the lack of prior acci-

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4. We emphasize that this is a rule applicable to defective design cases and not those involving a manufacturing flaw. Cases involving a manufacturing flaw do not implicate the inherent design or quality of the entire line of products in question, but only the quality of a particular unit or number of units of that product. In such cases, the fact that the product as a whole has a demonstrated safety-history is irrelevant. Compare Darrough v. White Motor Co., 30 Ill. Dec. at 472, 393 N.E.2d at 125 with Liberty Mutual Insurance Co. v. Williams Machine & Tool Co., 21 Ill.App.3d 510, 316 N.E.2d 255 (1974), affirmed on other grounds, 62 Ill.2d 77, 338 N.E.2d 857 (1975).

dents was substantively inadmissible, the defendant made the following offer of proof by avowal of counsel:

> . . . the defendant would testify [by its president] that the product in question, the Pak-Mor side-loading refuse compactor was initially designed and put into production in the same design and concept and mode in 1947 under the model designation AF, and in 1961 it was changed from a chain drive to a hydraulic drive, but otherwise remained in the same design configuration, that it remains in the same design configuration as of the date of this trial . . .
> During that period of time they [the defendant] have had no reports to the manufacturers of any injuries like or the same as the injuries complaint [sic] by the plaintiff in this action. . . .

Plaintiff argues that even if the *Fox Tucson Theaters Corp. v. Lindsay* rule is abrogated, this offer of proof provided an insufficient foundation upon which to predicate error in the case at bench. Defendant argues, on the other hand, that the avowal, coupled with evidence indicating that thousands of units of the product were in use under similar circumstances for a period of approximately thirty years, is sufficient to show the nature of the expected evidence and therefore constitute a sufficient offer of proof.

An offer of proof is "simply a detailed description of what the proposed evidence is." M. Udall & J. Livermore, *supra*, § 13 at 20. Defendant argues that the purposes underlying the requirement of a detailed foundational showing in the offer of proof are not enforced where, as here, the offer is challenged and refused on substantive rather than evidentiary grounds. *See id.* at 22; *Peterson v. Sundt*, 67 Ariz. 312, 318, 195 P.2d 158, 162 (1948). We agree; any requirement of further specificity, such as submitting the

full testimony in the verbal or written form, is excused by the lack of challenge to the foundation and by the court's rejection, on substantive grounds, of *per se* inadmissibility.

The vice in this offer of proof, however, is quite different. The offer indicates the nature of the proposed evidence. The problem is that defendant has made no showing that the testimony would be admissible even under the rule which we recognize today. Offers of proof serve a two-fold purpose:

> First, the description puts the trial judge in a better position to determine whether his initial ruling was erroneous and to allow the evidence to be introduced if he decides it was. Second, the appellate court will be able from the description to determine whether any error was harmful in the context of the case.

M. Udall & J. Livermore, *supra,* § 13 at 20-21 (footnotes omitted). We are forbidden by Ariz. Const. art. 6, § 27 to reverse for technical error and by Rule 103 of the Rules of Evidence to reverse for exclusion of evidence "unless a substantial right of the party is affected. . . ." The probative portion of the offer in the case at bench was simply that during the period of time the product had been in use the defendant had "had no reports to the manufacturer of any injuries" similar to that sustained by plaintiff. As indicated above (*ante* at 825-826), the absence of claims and reports is not the relevant fact, nor even one which justifies an inference of the relevant fact (that there have been no accidents), absent a showing that if there had been accidents the witness would have known of them either from the system utilized to track safety-history or from the investigation made at the sources of such information. There may have been no lawsuits filed against defendant, but we

have no way of knowing what workers' compensation claims were filed with appropriate administrative bodies nor any way of knowing what injuries were sustained but not pursued. In other words, we have no way to tell whether the testimony contained in the avowal, even if given by the president, would have carried convincing persuasive force, would have been admissible at all, or would have tipped the scales an iota.

On the other hand, plaintiff points out that there was evidence of at least one prior accident. While defendant attempts to distinguish the facts of that accident, we think it similar enough that it might have had some probative value, at least if defendant opened the door by alleging the lack of prior accidents. Thus, defendant's offer of proof is not that no similar accident had occurred, but really "that they were relatively few in number." (Supplementary brief of defendant at 3.)

Although defendant was informed by the trial court's ruling that the evidence would be rejected on substantive grounds and was thereby excused from showing the trial court the nature of the testimony in detail, it was still incumbent upon defendant to make a record for appeal indicating that there was evidence available which would have been admissible, which should have been admitted, and which might have affected the verdict. Defendant's offer of proof did not indicate that there existed any evidence to warrant the inference that the absence of claims tended to prove a lack of accidents. On this point the record is silent. Trial counsel offered no evidence of customer surveys, user surveys, safety record search, or any other fact to indicate that the absence of claims was some evidence of the absence of accidents under similar conditions of use. Nor does anything in the depositions, answers to in-

terrogatories, or other discovery data in the file (including the portions not offered in evidence) even hint that defendant could have gone beyond the "I know of no claims and therefore believe there were no accidents" format of testimony from the president of the company.

We are not disposed to reverse unless the record clearly demonstrates facts to support the theory which would have made the evidence substantively admissible and which would indicate the probative force that the evidence would have had if admitted. Even if we were to agree with defendant that the offer of proof was a futile act because the trial judge had asserted an absolute intention to exclude the evidence on substantive grounds, certainly where a party attempts to change existing law it has the burden to make a record for appeal. That record should demonstrate that if the trial court had applied the correct principle of law, the evidence would have been admissible and probably would have carried sufficient probative value to render its exclusion prejudicial.

On the record before us, in the absence of any such showing in the offer or any hint in discovery that such facts were available, we have no way of knowing whether the desired evidence even existed. To reverse, we would have to speculate that such evidence existed, that it was available to the defendant at trial, that it was of such a nature that the trial court would have abused its discretion under Rule 403 by excluding it, and that its probative force was such that exclusion was prejudicial. In fact, we have no way of knowing whether, even after reversal, defendant could offer the necessary evidence at retrial. We do not reverse on such speculation, but only where it is

apparent on the record that the error committed probably would have affected the verdict. *Petefish v. Dawe,* 137 Ariz. 570, 577-78, 672 P.2d 914, 921-22 (1983).

We therefore affirm the judgment of the trial court. The portion of the opinion of the court of appeals which deals with admissibility of safety-history is vacated, the remainder of the opinion is approved.

HOLOHAN, C.J., GORDON, V.C.J., and HAYS and CAMERON, JJ., concur.

IN THE COURT OF APPEALS FOR THE STATE OF ARIZONA

DIVISION 2

JERRY JONES and SANDRA JONES, husband and wife,

Plaintiffs/Appellees,

v.

PAK-MOR MANUFACTURING COMPANY,

Defendant/Appellant.

OPINION

(Filed January 12, 1984)

BIRDSALL, Chief Judge

On January 27, 1979, appellee Jerry Jones sustained personal injuries in connection with the use of a side-loading refuse compaction machine manufactured by the appellant Pak-Mor Manufacturing Company. Appellees' initial complaint alleged various claims of negligence against Mr. Jones' employer, SCA Services of Arizona, Inc., and

against a fellow employee and co-worker. The complaint was subsequently amended to add General Motors Corporation, GMC Quality Trucks, Inc., Pak-Mor Manufacturing Company, Inc., Truck Equipment Specialty Co., and National Refuse Equipment, Inc., as defendants.

The amended complaint alleged that the additional defendants had negligently developed, designed, manufactured, assembled, distributed, failed to warn, and sold the garbage collection machine on which Jerry Jones was working at the time of the injury. The complaint further alleged that said negligence was willful, wanton, and in reckless disregard of the life and safety of Mr. Jones and that the refuse collection machine was defective and unreasonably dangerous. Ultimately the appellees either voluntarily dismissed or settled their claims against all defendants except Pak-Mor.

The matter proceeded to trial in September of 1982. The jury returned a verdict in favor of appellee Jerry Jones in the amount of $1,124,000 and in favor of the appellee Sandra Jones, wife of Jerry Jones, in the amount of $200,000. Judgment was entered on September 27, 1982. Pak-Mor filed a Motion for Judgment Notwithstanding the Verdict or, in the alternative, a Motion for New Trial, both of which were denied by the court in a formal written order entered on December 6, 1982. This appeal followed.

The appellant contends that the trial court erred:

(1) In excluding evidence that there had been no prior accidents involving machines of the same design over a period of 26 years prior to the accident in question;

(2) In denying defendant's motion for directed verdict, and its subsequent motion for judgment notwithstanding the verdict;

(3) In refusing to instruct the jury that a manufacturer is under no duty to guard against injury from any danger which is open, obvious or known to plaintiff;

(4) In failing to order a remittitur, inasmuch as the damages were clearly excessive.

We affirm.

The facts viewed in the light most favorable to upholding the verdict are as follows. Jerry Jones obtained work with SCA as a helper on a refuse collection route after being unable to find a job in the construction industry. He received limited instructions for working on a rear-loading machine and no instructions for working on the side-loading machine. On his third day of work, he was first assigned along with another helper to work on a side-loading machine driven by Mike Campbell. Campbell had been hired as a driver at the same time Jones was hired as a helper, and this was also only his third day on the job. The three employees began work at 6 a.m., the driver was given a map of the collection route, and they drove to an area outside of Tucson near Pima College where they began collecting garbage. The area in which they were collecting garbage was the wrong route and in fact was not a garbage collection route at all. Jones was working as the helper on the driver's side of the refuse compaction machine. His custom was to ride on the fender running board between pick-up points on the route, with his body positioned toward the machine

and his head turned to the left looking toward the front of the machine and with his hands holding onto a grab iron or rail affixed to the side of the machine. The machine contained two bay doors on each side and the doors were open as the garbage was being collected.

Jones testified that he occasionally came in contact with brush and tree limbs growing in the alleys as the refuse compaction machine was travelling from pick-up point to pick-up point. At approximately 8:00 that morning, the truck entered an alley, stopped to pick up several cans of garbage, and then continued on along a fence line. Jones was riding on the fender running board of the machine as it continued down the alley. He was not looking forward until just before the alley curved around the fence corner, and when he looked up, he saw a fence coming toward him. The driver turned the corner too sharply which caused him to hit his right cheek and his shoulder on the fence corner, and this in turn caused his body to turn approximately 180°. He yelled to the driver to stop the truck and at the same time his left leg was caught between the edge of the fender running board and the corner of the fence, causing a break of the bones in his leg approximately four to five inches above his ankle.

The driver stopped the truck and he and the helper placed Jones in the cab of the truck. He was initially taken back to the offices of SCA and later transported by ambulance to the emergency room at St. Mary's Hospital.

The product which is the subject of this litigation is a side-loading refuse compaction machine, the Pak-Mor Model 20H. Pak-Mor manufactures the compaction ma-

chine and the fender running board, and these items are mounted, usually at the Pak-Mor manufacturing facility, on a truck, cab and chassis unit supplied by any number of manufacturers. The compaction machines are provided in models ranging from the 13H to the 28H, and the numerical designations of the various models refer to the cubic yard capacity of the machine.

The original garbage machine, the AF series, was designed by Pak-Mor in 1947 and included a running board for a man to stand on while performing his duties and to ride on from stop to stop for short distances. The width of the running board was 21½ inches and provided a lateral standing surface from the back of the cab to the rear fender.

The width of the running board of the 1972 Model H was the same as that of its 1947 predecessor. The parties disagree on the configuration of the compaction machine on the 1947 and 1972 models. The appellees argue in their brief that a significant difference between the 1947 machine and the 1972 Model H was the design of the tank which abutted the running board. The appellees argue that the predecessor tank had straight sides whereas the Model H has a cylindrical configuration. They contend that the adoption of the cylindrical tank took away a significant amount of space for the worker, reducing it from 17½ to 19½ inches to 3 to 4 inches. Appellees do not, however, support this contention with any reference to the record.

The appellant, on the other hand, states that the Pak-Mor refuse compaction machine, initially designed as the Model AF in 1947, was subsequently redesignated as the

Model H in 1961. In that year it was converted from a chain-driven compactor to a hydraulic compactor. The appellant further states that, in fact, the cylindrical design configuration was utilized in 1947, continuing without change to the present day. Appellant's position is supported by specific references to the record. Appellant also argues that an additional 8 inches of space is provided a worker on each side of the machine when the doors are open and that the doors would always be open when the machine was being used on route.

It is unclear what transpired during the machine's evolution to reduce the amount of space available to the worker, if, in fact, such a reduction took place. It is evident from the record that, practically speaking, excluding additional space resulting from having the doors open and regardless of the shape of the unit, a worker is provided with only 3½ to 4 inches of space within the 96 inch maximum permissible width of the vehicle. A.R.S. §28-1002(A) provides: "The total outside width of any vehicle or the load on the vehicle shall not exceed eight feet, [with exceptions not applicable here.]" Thus, the design of the running board and compaction machine forces a man's body to extend beyond the protected, lawful width of the vehicle.

PRIOR ACCIDENTS

At the outset of the trial, the court granted the appellees' motion in limine to exclude evidence that there had been no similar accidents involving machines of the same design. Appellants offered to prove that the product was designed and put into production in 1947, and that the design had continued without change in the area

claimed to ha. been defectively designed through the date of the manufacture of the subject machine in 1973. Appellants further offered to prove at trial that during approximately 26 years of use, no injuries were reported or claims made against them for any injury sustained by a side worker as a result of the collection unit passing near or being driven into a stationary object, such as occurred in this case.

Appellant argues that such evidence is relevant to both the negligence and strict liability claims in that it provides "some evidence" that the product was not defective or unreasonably dangerous and that it was not negligent in adopting the design. However, the trial court properly excluded such evidence. Although there is extensive contrary authority in other jurisdictions both in negligence and strict liability context, the law of Arizona is clear that such evidence is inadmissible and we are not permitted to hold otherwise.

Arizona admits evidence of prior accidents, but excludes evidence of the absence of prior accidents. The reason for this rule is set forth in the early case of *Fox Tucson Theatres Corporation v. Lindsay,* 47 Ariz. 388, 56 P.2d 183 (1936) to avoid the introduction of collateral issues that would distract the jurors' attention from the central issues at hand and greatly protract the trial. The appellant argues, however, that the court in *Fox* did not intend for this to be a rule of exclusion to be applied mechanically. Rather the court was to exercise its discretion and determine whether the introduction of such evidence would, in fact, have the adverse effects which the

court believed would result. Nothing in the language of *Fox,* however, suggests this intention.

Subsequent Arizona cases have similarly held that evidence of the absence of prior accidents is inadmissible in negligence actions. *Hlavaty v. Song,* 107 Ariz. 606, 491 P.2d 460 (1971); *Padilla v. Southern Pacific Transportation Company,* 131 Ariz. 533, 642 P.2d 878 (App. 1982); *St. Gregory's Church v. O'Connor,* 13 Ariz.App. 421, 477 P.2d 540 (1971). In *Hlavaty,* the plaintiff was injured when she fell in a restaurant. The trial court permitted the admission of evidence of the absence of similar accidents on the defendant's premises. Our supreme court found this to be error, stating:

> "Under proper circumstances, evidence of prior accidents may be admissible to show (1) the existence of a defective or dangerous condition, or (2) to give notive on the part of the defendant. See *Slow Development Company v. Coulter,* 88 Ariz. 122, 353 P.2d 890 (1960). This court had held, however, that testimony concerning freedom from previous accidents is immaterial and inadmissible. *Fox Tucson Theaters Corp. v. Lindsay,* 47 Ariz. 388, 56 P.2d 183 (1936). See also *Buchanan v. Green,* 73 Ariz. 159, 238 P.2d 1107 (1951). In this case the evidence was offered to show lack of notice and we therefore hold it was error to admit testimony concerning the absence of similar accidents on defendant's premises." 107 Ariz. at 609, 491 P.2d 460.

Appellant also argues that our courts are retreating from a strict rule of exclusion, citing *Rayner v. Stauffer Chemical Company,* 120 Ariz. 328, 585 P.2d 1240 (App. 1978), and *Tucson Industries, Inc. v. Schwartz,* 108 Ariz. 464, 501 P.2d 936 (1972).

The trial court in *Rayner* permitted evidence of absence of mishaps to show the behavior and effect of a chemical product on potatoes. In permitting this testimony, the trial court specifically recognized and affirmed the rule that lack of other accidents was inadmissible in a negligence action. The court also noted that the evidence was permitted in *Rayner,* a strict liability case, " . . . not to show the absence of mishaps but to show the behavior and effect of Eptam when used on potatoes." 120 Ariz. at 332, 585 P.2d 1240.

Pak-Mor argues that the *Rayner* opinion demonstrates a shift in Arizona away from the well-entrenched rule that lack of other accidents is inadmissible. The Court of Appeals in *Rayner* specifically rebutted that contention. In a footnote to the opinion, the court observed that:

> "In this regard, it is important to note that the trial court excluded evidence intended to show only a lack of complaints regarding the use of Eptam on potatoes. This evidence was properly excluded because it failed to show or demonstrate the behavioral characteristics of Eptam."

In *Tucson Industries, supra,* plaintiff was diagnosed as suffering from chemical keratitis which had been caused by exposure to fumes from glue used in remodeling an adjacent office. One defendant attempted to introduce evidence to the effect that there had not been a single report of eye injury in the 15 to 20 years that the company had been making the Contax Cement. Appellant relies on the language of the court in *Tucson Industries* which stated:

> "This is, of course, material to an action bottomed on negligence, but immaterial to an action based upon

> strict liability. It should however be noted that even in a negligence case, the lack of notice of injuries (1) does not establish the fact that no injuries had occurred, and (2) a long history of good fortune does not exclude a conclusion that ordinary prudence requires a warning." 108 Ariz. at 468.

The portion of the quote which states that such evidence is "material to an action bottomed on negligence" is obiter dictum, however, since the case was brought under a theory of strict liability.

The appellant also provides a lengthy analysis concerning the admissibility of lack of other accidents in a strict liability context. The appellant simply disagrees with the Arizona law which is uncontradicted that such evidence is inadmissible in an action based on strict liability. *Tucson Industries, supra; Rayner, supra.*

MOTION FOR DIRECTED VERDICT

Appellant claims that the trial court erred in denying its motion for directed verdict and its subsequent motion for judgment notwithstanding the verdict. It contends that there was insufficient evidence from which the jury could have properly found (1) that the design of the machine was defective, (2) that the design of the machine rendered it "unreasonably dangerous," (3) that the defendant was negligent in its design of the machine, and (4) that the design of the machine was a proximate cause of the accident.

As our court pointed out in *Hohlenkamp v. Rheem Manufacturing Company,* 134 Ariz. 208, 655 P.2d 32 (App. 1982), citing *Brady v. Melody Homes Manufacturer,* 121 Ariz. 253, 589 P.2d 896 (App. 1979), there are two types

of design defects. The design defect which forms the basis of a claim in strict liability views the defect from the standpoint of the consumer: Is the product, because of the alleged design defect, dangerous to an extent beyond that which would be contemplated by an ordinary user when used in an intended or reasonably foreseeable manner? The design defect upon which a negligence claim can be based views the defect from the standpoint of the manufacturer: Would a reasonably prudent manufacturer have adopted the design in question?

In the instant case, the question of appellant's liability was submitted to the jury on both theories: Strict liability for design defect and negligent design of the product. Since appellant's request for special interrogatories to the jury was denied, we do not know the basis for the jury's finding of liability. However, if the evidence is sufficient to support a finding of appellant's liability under either theory, the judgment must be affirmed. *Dunlap v. Jimmy GMC of Tucson, Inc.*, 136 Ariz. 338, 666 P.2d 83 (1983); *Reese v. Cradit*, 12 Ariz.App. 233, 469 P.2d 467 (1970).

In reviewing the trial court's denial of motions for directed verdict and for judgment notwithstanding the verdict, we must view the evidence in the light most favorable to sustaining the verdict. *Tucson Tile Insurance Company v. D'Ascoli*, 94 Ariz. 230, 383 P.2d 119 (1963). Viewed in this light, we find that the evidence was sufficient to support the jury's finding of liability under both theories.

The defective design and unreasonably dangerous condition of the garbage truck was the inadequacy of space on the running board available for the worker to perform his usual duties. The riding space designated for the man

while performing his duties is determined by the manufacturer's placement of the grab irons. The space available for a man's body on the running board at the position indicated by the grab irons was approximately 3½ inches.

Appellant published a brochure relating to this product which states that:

> "Also loaders can ride within the maximum width of body, receiving protection when passing any object which may create a safety hazard."

The evidence adduced at trial, however, substantiates appellees' claims that it was physically impossible for a man riding on the side of the truck to fall within Pak-Mor's design representations. The space provided forces the bulk of a man's body to extend outside the plane of the running board. According to expert testimony, not only is this unsafe and inadequate for the worker, the worker is riding in an illegal position.

At trial, the appellant took the position that a rider was not to stand directly in front of the grab irons, but was to stand between them (in front of the loading bay) and receive protection by placing his body into the garbage truck squatting beneath the curvature of the tank, or lying flat on the running board. However, expert testimony revealed that these suggestions were unsafe and imprudent. Appellant's own expert witness testified that the suggestion that a worker pull his body inside the tank was the "lesser of two evils." Not only would the worker be exposed to the odor within the tank, but also to various "pinch points."

Furthermore, evidence at trial demonstrated that it was foreseeable that the truck upon which appellee was riding would be used in roadways, thoroughfares, high-

ways and alleyways. Appellant's expert witness admitted that it was foreseeable that the truck would be used in close quarters. The chief design engineer of the product testified that, "[I]f the alleys were narrow, he would obviously ride on the running board for safety and protection."

Appellant suggests that appellees' experts failed to testify that one using the vehicle in the manner in which it was intended to be used would not recognize and appreciate that he was vulnerable to injury. It further argues that, under Arizona law, unless there is evidence from which a jury could conclude the danger would not have been recognized by the ordinary user, the appellee has failed to establish one of the essential elements of his case in strict liability. This argument is similar to the one made by the appellant in *Moorer v. Clayton Manufacturing Corporation,* 128 Ariz. 565, 627 P.2d 716 (App. 1981), and rejected by the court. In *Moorer* we stated:

> "Neither do we agree with appellant's contention that appellee did not sustain is burden of proof since no one testified that the machine fai'ed to perform as safely as an ordinary consumer would reasonably expect it to when the product was being used in an intended or reasonably foreseeable manner. Appellee's expert witness testified that the 'nip-point' made it hazardous. The jury saw pictures of the machine and heard testimony describing how the emissions control test was performed and how the accident happened. Whether the design there satisfied the strict liability standard was a question of fact for the jury. See *Byrns v. Riddell, Incorporated,* 113 Ariz. 264, 550 P.2d 1065 (1976). Cf *Union Supply Company v. Pust, supra* [196 Colo. 162, 583 P.2d 276 (1978)]." Id at 568, 627 P.2d 716.

Likewise in this case, expert testimony revealed the hazards to which a worker is exposed when riding on this particular truck when being used in an intended or reasonably foreseeable manner. Sufficient evidence was presented on the defective design and the unreasonably dangerous nature of the vehicle to create a question of fact for the jury's resolution.

Sufficient evidence was also presented for the jury to properly conclude that the appellant was negligent in the design of its product. As previously stated, it is unclear if any change occurred in the evolution of the garbage tank that reduced the amount of space available to a worker when riding on the side of the truck. It was undisputed only that 3½ inches of space is available on the Model H machine.

Jimmie Thurmond, president of the corporation, entrusted the design of the new model to his chief design engineer, Orin Anderson. Mr. Thurmond did not have specific conversations with Mr. Anderson about the safety of riders who may be on the side running board while the vehicle was in motion. No discussion occurred relating to the position and placement of grab irons on the Model H tank. Appellant failed to direct the persons responsible for the design of the Model H to investigate or pay attention to the safety of riders on the running board of the Model H unit. Even though the appellant argues that additional space was provided to the worker if he would stand with his body in the loading area, the president of the corporation testified that, to his knowledge, this was not intended. Pak-Mor did not direct nor perform any safety testing relating to the safety of men riding on the side of the machine.

Orin Anderson was not a safety engineer, nor was he aware of what a safety engineer does. Neither Mr. Anderson nor anyone associated with the development of the Model H belonged to a professional safety organization, maintained safety registration with any organization or held a safety certificate. Neither Mr. Anderson nor others responsible for the design of the new machine and fender running board used the science of ergonomics, which applies the dimensions of men in relationship to the machine which they are using, in the design of the new Model H. Anderson did not refer to any text or details relating to the size of men who would be working on this machine, nor did he agree that a safety engineer should be familiar with human conduct in designing the machine.

In contrast, the appellee's expert witness, Mr. MacCollum, a consulting safety engineer, testified that ergonomics data has been available since studies performed by the United States Army in 1959 and that a consideration of the dimensions of men as applied to the machinery they used was imperative in arriving at a safe working situation. Karl Schulz, defendant's own expert witness agreed that it would be imprudent for a manufacturer not to have a safety committee or a person responsible for safety to consider the interplay of the worker and the machine. Mr. Schulz also agreed that it would not be prudent for a manufacturer to fail to dedicate a significant portion of its time to investigating and testing the safety of the machine and the man who worked with it. Mr. Schulz opined that it would be prudent for a refuse machine manufacturer to consider the safety of the man on the side of the machine before the truck actually went into production.

Appellant's expert witness, Charles Lemme, testified on direct examination that standards promulgated by the American National Standards Institute (A.N.S.I.) were applicable at the time of the design of the Model H series and were representative of the standard and practice of manufacturers throughout the United States. In addition, Mr. Lemme testified that the standards represented the state of the art of safety at the time this machine was produced.

The A.N.S.I. enunciates standards for side-loading garbage trucks (such as the one on which the appellee was injured) and also rear-loading garbage trucks. Under the A.N.S.I. standards directed to rear-loading compaction machines, *a riding step* was defined in § 3.17.2. Yet, when asked to find the definition of *riding step* on a side-loading machine, the expert witness was unable to locate such a definition because it was not there. The expert witness conceded that the A.N.S.I. standards define *only a loading step* on a side-loader. Yet, on a rear-loader, *riding step* is defined.

In the section of the standards addressed to rear-loading machines *riding steps* and grab rails are defined in § 7.3.7. There is no similar section under side-loaders. The side-loader speaks about *loading steps* and grab rails in § 7.5.4. Nowhere in the A.N.S.I. standards is a riding step defined as acceptable equipment or otherwise on a side-loader. The clear implication is that *riding steps* are to be used *only* on a rear-loading machine where there is adequate escape for a worker. Only a *loading step* is to be provided on a side-loading machine so that the worker will not ride on the step while performing his job.

In addition, the appellant's expert recognized a publication of the National Safety Council relating to refuse collection. The appellant's expert witness agreed that according to the National Safety Council publication it was fully expected that worker would stand where the grab irons were located. Yet, on direct examination, both Mr. Lemme and Mr. Schulz stated that the correct riding area was *not* where the grab irons were located but between the grab irons in the loading bay area. The National Safety Council, in its publication, stated that:

> "Platforms shall be within the body of the truck so that outside riders will not strike against stationary objects or be struck by passing traffic and the width of the truck shall conform to City Ordinance."

Mr. Lemme agreed that the National Safety Council was of the opinion that men should ride within the body of the truck so they wouldn't strike stationary objects or be struck by cars. Despite the clear enunciation of the National Safety Council and Pak-Mor's own representations in its brochure, the fender running board platform was not designed in accordance with the accepted standards of either the National Safety Council or the American National Standards Institute.

When a manufacturer changes part of its product without giving adequate attention to the design of another part of its product, fails to consider the safety of the worker in relationship to the new design and fails to follow the standards which it recognizes as applicable in the form of the American Standards Institute and the National Safety Council, adequate evidence is presented of the party's negligence. Accordingly, sufficient evidence was sub-

mitted to the jury in this case to justify a finding that Pak-Mor was negligent.

We also reject appellant's contention that there was insufficient evidence from which the jury could have properly found that the design of the machine was the proximate cause of the accident. As we stated in *Moorer, supra,* at 569, 627 P.2d 716, "Product defectiveness can be a proximate cause concurrently and in combination with other causes."

JURY INSTRUCTIONS

The appellant argues that the court erred in refusing its requested jury instruction number 2 which read:

> "I instruct you that under the laws of the State or Arizona, a manufacturer is under no duty to guard against injury from any danger which is open, obvious or known to plaintiff."

Instead, the court gave appellees' requested instruction:

> "In determining whether a product is unreasonably dangerous you may consider the following factors. The usefulness and desireability [sic] of the product, the availability of other and safer products to meet the same need, the likelihood of injury and its probable seriousness, *the obviousness of the danger,* the common knowledge and normal public expectation of the danger, and the avoidability of injury by care in the use of the product, and the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive." [Emphasis added]

It is well established that the trial court's failure to give a requested instruction is not error where the subject

of the requested instruction is adequately covered by other given instructions. *Harris v. Murch,* 18 Ariz.App. 466, 503 P.2d 821 (1972). Here the trial court properly instructed the jury in accordance with *Byrns v. Riddell, Incorporated,* 113 Ariz. 264, 550 P.2d 1065 (1976), and *Turner v. Machine Ice Company,* 138 Ariz. 329, 674 P.2d 883 (1983), that the "obviousness of the danger" was *a* factor to be considered by the jury along with others in determining whether the truck was unreasonably dangerous. Additionally, the given instruction more accurately reflects the law regarding an open and obvious condition.

DAMAGES AWARDED

Appellant urges that the damages awarded in this case, totalling more than $1,300,000, were clearly excessive and that the trial court should have ordered a remittitur. It argues that there was no supporting evidence to justify the verdict that was rendered and suggests that $500,000 would more accurately reflect the extent of the appellees' general and special damages.

In making this argument, appellant presents a comparison of the damages awarded to the plaintiff, Mrs. Hernandez, in *Hernandez v. State,* 128 Ariz. 30, 623 P.2d 819 (App. 1980), to those damages awarded appellee. In *Hernandez,* the plaintiff's left leg had to be amputated above the knee as a result of her injuries. The jury verdict in that case was $52,487, to which the court granted an additur of $75,000.

This comparison is unpersuasive for two reasons. First, our courts have criticized such comparisons because of the inherent differences in the circumstances involved in any two personal injury cases. *Wry v. Dial,* 18 Ariz.

App. 503, 503 P.2d 979 (1973). Second, the damages award granted in *Hernandez* and reported by appellant does not reflect the entire history of that case. In *Hernandez, supra,* our court affirmed the trial court's order granting a new trial to Mr. and Mrs. Hernandez on the issue of damages for personal injuries to Mrs. Hernandez. In this second trial, Mrs. Hernandez was awarded $1,525,000. The state unsuccessfully sought a remittitur from this verdict. The second appeal followed. In *Hernandez v. State,* 132 Ariz. 561, 647 P.2d 1159 (App. 1982), our court affirmed the trial court's denial of the state's request for remittitur stating:

> "We recently considered a contention that the trial court erred in refusing a remittitur or new trial in *Garcia v. City of South Tucson,* 131 Ariz. 315, 640 P.2d 1117 (1981), where the verdict for personal injuries was $3,592,213. We held that where the trial court has refused to interfere with the jury's determination of damages we cannot interpose our judgment unless convinced that the verdict is so outrageously excessive as to suggest, at first blush, passion or prejudice." 132 Ariz. 563, 647 P.2d 1159.

Likewise, in this case we find that the verdict was not clearly excessive. Dr. Ed Schaffer, the attending physician from Indianapolis, Indiana, testified that he told the appellee that his leg should be removed in October 1980. Appellee refused. Appellee was informed again in 1981 that removal of the leg was the appropriate treatment. The appellee chose to undergo two future operations prior to allowing the amputation to occur. Dr. Schaffer testified that the chance of success of either of these operations is small.

If the operations are successful he will have a leg-length discrepancy and will have to wear a lift. With a

leg-length discrepancy, he can develop post-traumatic arthritis of the joints, low pack pain and possibly arthritis of the lumbo-sacrial spine. The leg-length discrepancy plus the immobilization of the ankle joint for such an extended period of time creates the definite potential for development of post-traumatic degenerative arthritis of those areas. Treatment consists of medication, physical therapy if necessary, and as a last resort an ankle fusion. He will also suffer from osteomyelitis, a continuing infection of the leg which never clears and which prevents the tibia from forming a union. Any minor trauma may aggravate the osteomyelitis and may necessitate hospitalization and ultimately amputation. Indeed, Dr. Schaffer was of the opinion that amputation was the appropriate treatment and that the appellee would fare better if he would consent to that operation and begin his rehabilitation as an amputee.

The damages were not clearly excessive.

Affirmed.

HATHAWAY and HOWARD, JJ., concur.